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16   **UNITED STATES DISTRICT COURT**

17   **NORTHERN DISTRICT OF CALIFORNIA**

                SAN FRANCISCO DIVISION
18

19 Waymo LLC,   Case No. 3:17-cv-00939-WHA

20   Plaintiff,   **MOTION IN LIMINE TO EXCLUDE**
                                         TESTIMONY OF DR. HESSELINK
21   v.   **REGARDING PROTECTIONS OF WAYMO'S**
                                         ALLEGED TRADE SECRETS
    Uber Technologies, Inc.; Ottomotto LLC;
22 Otto Trucking LLC,   Date: September 27, 2017
                                         Time: 8:00 a.m.
23   Defendants.   Courtroom: 8 (19th Floor)
                                         Judge: Hon. William Alsup
24
                                         Filed/Lodged Concurrently with:
25   1. Declaration of Hong-An Vu; and
                                           2. [Proposed] Order
26
                                         Trial: October 10, 2017
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I.   INTRODUCTION

Waymo has submitted an unreliable expert report from Dr. Lambertus Hesselink opining, in paragraphs 65-72 of his report, that the Waymo has reasonably protected its trade secrets. Dr. Hesselink's opinion is flawed and should not be admitted at trial. His opinion is based in large part on the declaration of Michael Janosko, a Google security engineer. Mr. Janosko admitted in deposition that he did not have personal knowledge of the SVN server —the repository in which the 14,000 files were kept—in order to speak on Waymo's protections of that server. Indeed, Mr. Janosko testified what he knew about the server was provided to him entirely by Sasha Zbrozek. Mr. Zbrozek, on the other hand, considered the files kept on the SVN server to be "low-value" such that Google decided to host the entire server off of Google's security infrastructure. In addition, Dr. Hesselink's opinion about other protections Google has in place to protect confidential information is irrelevant as Michael Janosko expressly stated that those protections did not apply to the SVN server.

Dr. Hesselink's opinion that the alleged trade secrets have been reasonably protected, found on paragraphs 65-72 of his expert report (Vu Decl. at Ex. 1) should be excluded as inaccurate, unsupported, and irrelevant under Federal Rule of Evidence 702, and 401 and 403

II.   BACKGROUND

A.   WAYMO'S TRADE SECRET CLAIM IS BASED ON THE DOWNLOADING OF FILES FROM THE SVN SERVER.

From the beginning, Waymo has made its trade secret claim about the alleged improper downloading of files from the SVN server—a repository that was used to store materials relating to the hardware for Google's self-driving project. Waymo filed its complaint alleging misappropriation of 121 trade secrets based on Mr. Levandowski's "extraordinary efforts to raid Waymo's [SVN] server" and "downloaded 14,000 files, representing approximately 9.7 GB of highly confidential data," Dkt. 23 at 3. It emphasized that having access to these "crown jewels of the kind of technology we are taking about" is the basis for their "big damages number."

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B.   DR. HESSELINK'S OPINION OF THE SVN SERVER IS BASED ON THE UNSUPPORTED DECLARATION OF MICHAEL JANOSKO.

In his expert report, Dr. Hesslink discusses the SVN server in one paragraph that relies almost entirely on the Declaration of Michael Janosko submitted as part of Waymo's Preliminary Injunction motion:

Vu Decl. at Ex. 1 (Excerpts from Hesselink Report); Ex. 3 (Janosko Declaration).

Dr. Hesselink's opinion is improper and unreliable. He relied entirely on the declaration of Michael Janosko and there is no indication that he ever accessed or used the SVN server to conduct his own investigation or analysis.

Michael Janosko repeatedly testified in his deposition that he had no personal knowledge of the SVN server.

Id. at Ex. 2, Janokso Tr. at 20:2-5.

Id. at 58:9-18

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4   *Id*. at 59:19-23.

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11   *Id*. at 86:12-22.

12   When asked about details of the information in his declaration, Mr. Janosko could not

13   respond because of his lack of personal knowledge. Dr. Hesselink extolled Waymo's alleged

14   practice of performing ▮▮▮▮▮ of its access list based on Mr. Janosko's declaration stating

15   that "▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮▮." *Id*. at Ex.

16   1 ¶ 69. However, Mr. Janosko testified that he did not know what "▮▮▮▮▮▮" meant

17   and could not provide any details about this procedure because they were not provided by Mr.

18   Zbrozek. Vu Decl. at Ex. 2 at 68:3-14. He did not know the definition of a "▮▮▮" for the

19   SVN server, whether passwords automatically expired, when the ▮▮▮▮▮ place, how

20   long departing employees or contractors continued to have access to the SVN server, and how

21   often access control lists were updated. *Id.* at 19:19-20:1, 67:11-70:6). Though he stated

22   affirmatively in his declaration that "▮▮▮▮▮▮▮▮▮," which Dr. Hesselink relied on

23   in his report (Ex. 1 at ¶ 69), Mr. Janosko was not aware of any Waymo policy prohibiting users

24   from ▮▮▮▮▮. *Id.* at Ex. 2 at 81:4-7.

25   Dr. Hesselink did not speak to Mr. Zbrozek, did not review his deposition testimony, or

26   rely on any documents produced in this case in providing his opinion that Waymo had reasonably

27   protected its electronic information. Documents produced in this case demonstrate that the SVN

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1   was selected for its speed and efficiency, not security, as the documents contained on this server

2   were low value.

3   For example, in determining how to launch the next SVN repository in February 2015, Mr.

4   Zbrozek stated that his primary considerations were (1 ███████████████████████████

5   ██

6   ██████████████████ Vu Decl. at Ex. 4 WAYMO-UBER-00047580. Security (other than the

7   encryption in transmissions) was not a requirement or a wish. *See id.* Mr. Zbrozek further

8   emphasized that the SVN server was chosen for convenience and not for safety by concluding:

9   "██

10   ██████████████████

11   *Id.* In October 2016, when Waymo's outside counsel was looking for suspicious activity by Mr.

12   Levandowski, Mr. Zbrozek confirmed his February 2015 statements. In response to a question

13   from a lawyer about whether Mr. Levandowski's accessing of the SVN server and its contents was

14   "a little strange, isn't it," Mr. Zbrozek responded, "It's all electronics designs – schematics and

15   PCB layouts. And the component library for their creation. It was considered low-value enough

16   that we had even considered hosting it off of Google infrastructure . . . Doesn't ring the alarm bells

17   for me." *Id*. at Ex. 5 WAYM-UBER-00086885. Dr. Hesselink failed to consider any of this

18   evidence and instead, merely relied on second hand knowledge at best.

19   **C.   DR. HESSELINK OPINES ON GOOGLE/WAYMO PROTECTIONS THAT DO NOT**

20   **APPLY TO THE SVN SERVER.**

21   Dr. Hesselink then spends several paragraphs discussing the security protections for

22   "Waymo's other servers and network infrastructure" which are allegedly shared with Google,

23   again relying on the first four pages of the Declaration of Michael Janosko. Vu Decl. at Ex. 1,

24   ¶70. Both Dr. Hesselink and Michael Janosko discuss Google's infrastructure protecting Gmail

25   and Google Drive. *See id*., at Ex. 1, ¶ 70; Ex. 3 ¶ 13. But neither mention the SVN server when

26   discussing this network infrastructure. ████████████████████████████

27   ████████████████████████ *Id.* at Ex. 3, ¶ 23 ("[████████████████████

28   ████████████████████ Michael Janosko made this clear at his deposition:

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Id. at Ex. 2, Janosko Tr. 28:1-10.

Mr. Janosko also made clear that his security engineer team did not have any direct involvement in monitoring the SVN server. *See id.* at 19:3-10 (

Google's monitoring of login credentials , as referenced by Dr. Hesselink in paragraph 70 of his report,

See Id. at Ex. 1, ¶ 70; Ex. 2, Janosko Tr. at 25:18-26:13; *see also* Ex. 6, Zbrozek 9/6/17 Tr. 286:15-286:17.

Dr. Hesselink's report discusses   . *Id.* at Ex. 1, ¶ 71. Mr. Janosko corroborated this description, as he testified that merely acquiring Google login credentials is not enough since Google requires   in order for the credentials to even work. *Id.* at 64:7-23. But he also testified that this

because when Mr. Zbrozek's demonstrated accessing the SVN server, the key fob was not necessary. *Id*. at 64:14-65:3.

Dr. Hesselink concludes his section on the reasonableness of Waymo's protections of its electronic information by discussing the system of alerts that would notify engineers of potential

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1   breaches. *See* Vu Decl., Ex. 1 at ¶ 72. However, as stated above, none of the engineers on Mr.

2   Janosko's team were responsible for monitoring the SVN server and he did not know whether

3   anyone in his group or the detection response teams would receive alerts about the SVN server.

4   *See id*. at e 2, 33:8-14.

5   **D.   DR. HESSELINK PARROTS THE DECLARATIONS OF PIERRE YVES-DROZ AND TIM**

6   **WILLIS.**

7   Dr. Hesselink also opines that Waymo has taken reasonable measures to ensure that people

8   protect its trade secrets. This opinion is based almost entirely on the declarations of Pierre Yves-

9   Droz and Tim Willis. *See* Ex. 1 at 23-24. There is no evidence that Dr. Hesselink assessed any of

10   Google or Waymo's security training materials, policies, customer agreements other than the

11   excerpt from the Gorilla Circuits agreement found in the Willis Declaration, or any specifications

12   provided by Waymo to its vendors. *See id*. It is not expert testimony to simply mimic the

13   statements of fact witnesses.

14   **III.   THE COURT SHOULD EXCLUDE DR. HESSELINK'S TESTIMONY**

15   **REGARDING WAYMO'S ALLEGED REASONABLE EFFORTS TO PROTECT**

16   **ITS PURPORTED TRADE SECRETS.**

17   Dr. Hesselink's opinion must be excluded under *Daubert* and Rule 702, which requires

18   district courts to act as a gatekeeper to "ensure that any and all scientific testimony or evidence

19   admitted is not only relevant, but reliable." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579,

20   589 (1993). Courts must assess "whether the reasoning or methodology underlying the testimony

21   is scientifically valid and of whether that reasoning or methodology properly can be applied to the

22   facts in issue." *Claar v. Burlington N. R. Co.*, 29 F.3d 499, 501 (9th Cir. 1994) (emphasis in

23   original), citing *Daubert* at 592-93 (1993). Importantly, courts must "ensure the expert 'employs

24   in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in

25   the relevant field.'" *Pooshs v. Phillip Morris USA, Inc.*, 287 F.R.D. 543, 547 (N.D. Cal. 2012),

26   citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). Furthermore, the expert's

27   specialized knowledge "must also be relevant." *United States v. Filler*, 210 F.3d 386 (9th Cir.

28   2000), citing *Daubert* at 591.

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1   **A.   THE COURT SHOULD EXCLUDE DR. HESSELINK'S OPINION ON THE SVN SERVER**

2   **AS UNRELIABLE AND UNSUPPORTED.**

3   Dr. Hesselink's chosen method to arrive at his conclusions about the SVN server's security

4   protections cannot be characterized as a reliable methodology. In fact, Dr. Hesselink performed

5   *no* investigation, and his only supporting evidence is from the declaration of a witness who *also*

6   failed to properly investigate the SVN server. *See Ollier v. Sweetwater Union High Sch. Dist.*,

7   768 F.3d 843, 860 (9th Cir. 2014) (affirming the exclusion of the testimony of an expert who

8   submitted a report prior to an "in-person investigation"). Mr. Janosko, whose declaration Dr.

9   Hesselink relies upon, admits that he has never even accessed the SVN server and was merely

10   shown a demonstration of how to access the SVN server and its file structure over WebEx.

11   Janokso Tr. at 86:12-22. Mr. Janosko actually testified that he was not aware of Waymo's policies

12   regarding protection or sharing of credentials for the SVN, and was unable to provide any

13   information as to the alleged ███████ of access to the SVN server. Because Dr. Hesselink

14   relied on the Janosko Declaration instead of performing his own investigation, Dr. Hesselink's

15   opinion is also unsupported and should be excluded. *See Claar*, 29 F.3d at 502-3 (experts' method

16   of arriving at a conclusion before doing research is the "antithesis" of the scientific method).

17   In addition, his mere parroting of Mr. Janosko's declaration can hardly be characterized as

18   a methodology, let alone one that would meet the *Daubert* standard. Like the expert in *Ollier*, Mr.

19   Janosko and Dr. Hesselink form their conclusions before they even bothered to personally assess

20   the security of the SVN server. Worse, Mr. Janosko's declaration is the sole basis of Dr.

21   Hesselink's expert testimony Otto Trucking is seeking to exclude. This does not come close to the

22   "intellectual rigor" contemplated in *Daubert*, *Kumho* and their progeny. Experts cannot testify

23   "solely as a summarizer of documents," particularly when the substance of those documents have

24   no validity. *Pooshs*, 287 F.R.D. at 552 (expert testimony excluded because he formed "his

25   opinion primarily by pointing to documents that speak for themselves."). Thus, Dr. Hesselink's

26   conclusions are clearly based on "personal opinions and speculation rather than on a systematic

27   assessment," and his conclusions must not be admitted. *Ollier,* 768 F.3d at 861; *see also Claar*,

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1   29 F.3d at 503 n.5 (expert improperly signed affidavit containing his findings "prior to reviewing

2   any of the relevant literature.").

3   **B.   DR. HESSELINK'S OPINION ON GOOGLE'S INFRASTRUCTURE SHOULD BE**

4   **EXCLUDED AS IRRELEVANT AND MERELY A SUMMARY OF DOCUMENTS.**

5   Dr. Hesselink not only failed to use any verifiable scientific methodology to form his

6   conclusions, his conclusion has no bearing on this case. That Google has protections in place to

7   protect other aspects of its network is irrelevant here because those protections did not apply to the

8   SVN server—the source of the purported trade secrets. For example, Dr. Hesselink's discussion

9   about the ███████████████████ used by Google to prevent the access to its network

10 using compromised credentials is irrelevant because that ████████████ ████████

11 ████████   Indeed, Mr. Janosko testified that the video demonstration explained how to

12 access the SVN server, and ██████████████████████. Similarly, the ████

13 ██

14 ██. As

15 such, any testimony on any non-SVN Google security network is not relevant to this dispute.

16 Courts have excluded expert testimony as irrelevant when the testimony does not relate to the

17 issues at hand, and the Court should do so here. *See Filler*, 210 F.3d at 386 (excluding evidence

18 of common law enforcement practices when the issue is not in play); Fed. R. Civ. Proc. 401; *see*

19 *also Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1321 (9th Cir. 1995) (excluding

20 epidemiologist vague assertions of a statistical relationship when such evidence would not be

21 helpful and only serve to confuse).

22   If anything, any testimony supporting Google's purported security protections *undermine*

23 any conclusion that the SVN server was adequately protected because such testimony shows that

24 the SVN had significantly *less* security protections and protocols. Such an erroneous line of

25 reasoning can only serve to confuse and would not assist any trier of fact.

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C.   THE COURT SHOULD EXCLUDE ANY TESTIMONY BY DR. HESSELINK THAT IS MERELY A RECITAL OF INFORMATION FOUND IN DECLARATIONS.

To the extent that any of Dr. Hesselink's opinion as to Google's infrastructure is relevant to the allegations against Radu Raduta and Sameer Kshirsagar, who are alleged to have downloaded three and five documents from Google Drive respectively in the last couple months before they left Google, it should also be excluded. His opinion on Google's systems is merely a summary of the declaration of Mr. Janosko. Vu Decl. Ex. 1 at 24-26. Dr. Hesselink performed no analysis or investigation of Google's systems. As such, his opinion should be excluded as it merely summarizes a document that speaks for itself and fails to meet the scientific standard. *Ollier,* 768 F.3d at 861; *Pooshs*, 287 F.R.D. at 552.

Similarly, Dr. Hesselink performed no independent investigation or assessment of Waymo's/Google's policies, agreements, and vendor specifications to support his opinion that those documents are sufficient measures undertaken by Google to ensure that individuals protect the purported trade secrets. He merely repeats the information in the Droz and Willis declarations. As such, his opinion was not based on any methodology and is merely inadmissible opinion testimony. *Ollier,* 768 F.3d at 861; *Pooshs*, 287 F.R.D. at 552.

IV.   CONCLUSION

Dr. Hesselink did not use any verifiable methodology to arrive to form his expert opinion, and his conclusions are completely irrelevant. His testimony must be excluded from this case.

Dated: September 16, 2017   Respectfully submitted,

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